

SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

BILL: CS/SB 1600

SPONSOR: Governmental Oversight and Productivity Committee and Senator Sebesta

SUBJECT: Public Construction Bonds

DATE: March 18, 2004 REVISED: _____

| | ANALYST | STAFF DIRECTOR | REFERENCE | ACTION |
|----|---------|----------------|-----------|--------|
| 1. | White | Wilson | GO | Fav/CS |
| 2. | | | JU | |
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I. Summary:

The bill amends the model bond form contained in s. 255.05(3), F.S., which may be used for public construction projects, to: (a) add a space for entry of a bond number; and (b) include language on the face of the bond stating that any action instituted by a claimant under the bond for payment must be in accordance with the notice and time limitation provisions contained in s. 255.05(2), F.S. Further, the bill amends s. 255.05(4), F.S., to provide that the payment provisions of all public construction bonds are to be construed as statutory bonds that shall not, under any circumstances be converted into common law bonds. For future public construction bonds, these amendments should eliminate an issue currently being considered by the Florida Supreme Court, which is whether the failure of a public construction bond to specifically reference the statutory notice and time limitations converts that bond into a common law bond.

This bill substantially amends s. 255.05, F.S.

II. Present Situation:

Payment and performance bonds for public construction projects

In Florida, “surety insurance” is defined to include payment and performance bonds.¹ Such bonds are contracts where a surety company that is paid a premium by a principal, e.g., a general contractor, agrees to stand in the place of the principal in the event the principal defaults either as to performance of the contract or as to payment of its subcontractors/suppliers.^{2 3}

¹ Section 624.606, F.S.

² *Surety Bonds: A Basic User’s Guide for Payment Bond Claimants and Obligees*, Construction Lawyer, Daniel Toomey and Tamara McNulty, Winter, 2002.

Unlike a normal insurance situation in which there is a two-party relationship, i.e., the insurer and the insured, the nature of surety is a triparty relationship that consists of: (a) the obligee, which may be either the person purchasing the performance from the contractor in the case of a performance bond or the subcontractor/supplier expecting payment from the contractor in the case of a payment bond; (b) a principal, e.g., the contractor; and (c) the surety that provides the bond to protect against the principal's default. A second difference between a normal insurance relationship and a surety relationship is that the surety requires a principal to indemnify the surety against losses sustained by the carrier if the surety must perform or pay under the bonds. In this instance, the principal is referred to as the indemnitor to the surety.⁴

Section 255.05(1)(a), F.S., provides that any person who enters into a formal contract with the state or any county, city, or political subdivision thereof, or other public authority for the construction of a public building, for the prosecution and completion of a public work, or for repairs upon a public building or public work is required to deliver to the public owner a payment and performance bond with a state authorized surety insurer. The bond is to be conditioned on the contractor's timely and satisfactory performance of the contract and on the prompt payment of all persons defined in s. 713.01, F.S., the Mechanic's Lien Law, who furnish labor, services, or materials for the prosecution of the work provided in the contract.⁵

The payment and performance bond must state on its front page: (a) the name, principal business address, and phone number of the contractor, the surety, the owner of the property being improved, and, if different from the owner, the contracting public entity; (b) the contract number assigned by the contracting public entity; and (c) a description of the project sufficient to identify it, such as a legal description or the street address of the property being improved, and a general description of the improvement.⁶ Section 255.05(3), F.S., further provides that this bond may be in substantially the same form as a model form public construction bond that is provided in the subsection, and s. 255.05(6), F.S., provides that all bonds executed pursuant to the section make reference to the section number and must contain a reference to the notice and time limitation provisions of this section.

Statutory bond notice and time restrictions

In s. 255.05(2), F.S., the following notice and time restrictions are set forth: (a) a claimant, who is not a laborer, who is not in contractual privity with the contractor, and who has not received payment, must furnish, either before commencing or no later than 45 days after commencing to furnish labor, materials or supplies for the prosecution of the work, the contractor with a notice that he or she intends to look to the bond for protection; and (b) a claimant, who is not in privity with the contractor and who has not received payment for his or her labor, materials, or supplies, must deliver, either 45 or more days into the progress of the work, but no more than 90 days after

³ Although surety is oft times referred to in law as "surety insurance," legal commentators have explained that this is somewhat of a misnomer, as it does not insure the purchaser of the surety, i.e., the general contractor, against claims such as poor workmanship; rather, the surety insurance protects the obligee against the general contractor's default. *Id.*

⁴ *Id.*

⁵ Section 255.05(1)(a), F.S.

⁶ *Id.*

the completion of the work, to the contractor and to the surety written notice of the performance of labor or delivery of the materials or supplies and of the nonpayment.⁷

Section 255.05(4), F.S., states that the payment provisions of all bonds furnished for public works contracts must, regardless of form, be construed as statutory bond provisions, subject to all notice and time limitations in the section. Section 255.05(6), F.S., states that all bonds executed pursuant to the section shall make reference to the section by number and to the notice and time limitations in the section.

The Second District Court of Appeals has held that the failure of a public construction bond to specifically reference the subsection (2) notice and time limitations results in a common law, rather than statutory, bond.⁸ Claims under a common law bond may be brought within the general statute of limitations for suits on written contracts, which, pursuant to s. 95.11, F.S., is 5 years. Conversely, the Fifth District Court of Appeals has held that the failure to reference subsection (2) does not alter a statutory bond into a common law bond; however, a bonding company may be estopped from asserting a statutory notice and time limitations if a claimant's failure to comply with those limitations is the result of the bond's failure to contain the information required by statute.⁹ Review of these conflicting decisions was granted by the Florida Supreme Court on March 28, 2003, but a decision has not yet been rendered by the Court.¹⁰

Surety liability

The Florida Supreme Court has held that a surety's liability is coextensive with that of a principal; however, the surety's liability is limited by the terms of the bond.¹¹ For example, the Court has held that delay damages could not be sought by an owner against a performance bond where that bond's terms did not provide for such damages.¹² The Eleventh Circuit has held that the bond's terms may expressly incorporate other documents, e.g., contracts, by reference and that such express incorporation is sufficient to hold a surety liable for damages provided for in the documents.¹³

III. Effect of Proposed Changes:

The bill amends the model bond form contained in subsection (3) of s. 255.05, F.S., which may be used as the public construction bond required by subsection (1), to: (a) add a space for entry of a bond number; and (b) include language on the face of the bond stating that any action instituted by a claimant under the bond for payment must be in accordance with the notice and time limitation provisions contained in subsection (2).

⁷ Section 255.05(2), F.S.

⁸ *American Home Assurance Company v. Plaza Materials Corporation*, 826 So.2d 358, 359 (Fla. 2nd DCA 2002).

⁹ *Florida Crushed Stone Company v. American Home Assurance Company*, 815 So.2d 715, 716-717 (Fla. 5th DCA 2002).

¹⁰ *American Home Assurance Company v. Plaza Materials Corporation*, 842 So.2d 842 (Fla. 2003).

¹¹ *American Home Assurance Company v. Larkin General Hospital, Ltd.*, 593 So.2d 195, 196.

¹² *Id.* at 197.

¹³ *National Fire Insurance Company of Hartford v. Fortune Construction Company*, 320 F.3d 1260, 1275 (11th Cir. 2003).

Further, the bill amends subsection (4) to state that the payment provisions of all public construction bonds required by subsection (1), regardless of form, are to be construed as statutory bonds that shall not, under any circumstances, be converted into common law bonds. Subsection (6) is amended by the bill to state that all payment bond forms used by a public owner and executed by a surety pursuant to the section must make reference to notice and time limitations of subsection (2).

The bill's amendments should eliminate the issue currently being considered by the Florida Supreme Court as to whether the failure to specifically reference the notice and time limitations of subsection (2) in a public construction bond converts that bond into a common law bond. Under the bill, all public construction bonds required by subsection (1) may never be converted to common law bonds.

The bill provides that it takes effect upon becoming a law.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

V. Economic Impact and Fiscal Note:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

The bill's amendments to s. 255.05, F.S., should result in the payment provisions of all public construction bonds being subject to the statutory notice and time limitations for payment claims against the bonds. The 90-day statutory notice requirement for payment claims is significantly shorter than the five-year requirement for common-law claims. Thus, the bill should provide sureties and contractors with more timely notice of claims.

Additionally, the bill should clarify the rights and obligations of the parties to the public owner's bond, given the lack of clarity in current Florida case law.

C. Government Sector Impact:

The bill would clarify the rights and obligations of the parties to the public owner's bond, given the lack of clarity in current Florida case law.

VI. Technical Deficiencies:

None.

VII. Related Issues:

The bill's amendments to s. 255.05, F.S., conflict with amendments to that same section of law contained in CS/CS for SB 544 as follows: (a) this bill adds language that references language that is stricken by CS/CS for SB 544; and (b) this bill strikes language that is amended by CS/CS for SB 544. If both bills were to be enacted and if it is impossible to harmonize the provisions, as currently appears to be the case, the later expression of the Legislature will control.¹⁴

VIII. Amendments:

None.

This Senate staff analysis does not reflect the intent or official position of the bill's sponsor or the Florida Senate.

¹⁴ *State v. Young*, 357 So.2d 416, 417 (Fla. 1978).